IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1054

FLORENCE E. SMITH,
Administratrix of the Estate of
ROBERT SMITH, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC CO.,
a corporation,

Defendant and
Respondent.

REPLY BRIEF OF PETITIONER FLORENCE E. SMITH

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TOPICAL INDEX

	Page
INTRODUCTORY COMMENTS	1
WITH RESPECT TO THE FACTS:	3
WITH RESPECT TO THE LAW:	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

Fennessy v. Pac. Gas & Elec. Co.,
20 Cal. 2d 141 — 10

Hilts v. County of Solano,
265 Cal. App. 2d 161 — 9

Inman v. Baltimore and Ohio R. Co.,
361 U.S. 138, 80 S. Ct. 242 — 3, 10

Johnson v. City of Rockford,
182 N. E. 2d 240 (Ill. App. 1962) — 11

Jones v. Fat,
86 Cal. App. 2d 823 — 4

Mortensen v. Southern Pac. Co.,
245 Cal. App. 2d 241 — 11, 12

O'Neill v. City of Port Jervis,
171 N. E. 694
(N. Y. Ct. App. 1930) 10

Shafir v. Seben,
233 S. W. 419
(Sup. Ct. Mo. 1921) 10

Simpson v. Texas & N. O. R. Co.,
297 F. 2d 660
(5th Cir. 1962) 10

Sleeman v. Chesapeake & Ohio R. Co.,
414 F. 2d 305
(6th Cir. 1969) 3

Taylor v. Canadian National Railway Co.,
301 F. 2d 1, 2d Cir. 1962,
cert. den. 370 U. S. 938 8

Whitley v. Texas and Pacific Railway Co.,
328 F. 2d 308
(5th Cir. 1964) 6

Textbooks

2 Magana, "Motor Vehicle Accidents,"
§217, p. 1319 4

Webster's Third New International
Dictionary, Unabridged (1964);
p. 1212 4

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INTRODUCTORY COMMENTS

It should be noted that Respondent's Brief does not controvert the fact that respondent could have feasibly eliminated

the necessity for Mr. Smith to cross the street. And it does not controvert the fact that there were employee complaints regarding the danger.[1] As we understand it, respondent's position is that, as a matter of law, it owed absolutely no duty to avoid exposing Mr. Smith to the hazards of jaywalking (Respondent's Brief at pp. 11-18) and that, as a matter of law, the negligence of the third party motorist, Mrs. Coker, insulates it from liability.

The latter proposition has already been fully briefed by us (but see also pp. 11-12, infra). The former proposition -- that respondent had no duty to protect Mr. Smith from the hazards of jaywalking -- is, we respectfully submit, devoid of merit. A jury question is presented as to the extent of respondent's duty. To the extent that respondent's authorities are inconsistent with petitioner's authorities on this point, they represent decisions of Courts of Appeal "in conflict" with decisions of other Courts of Appeal (Rule 19, Rules of this Court) and, indeed, with the decisions of this Court. See cases cited in our Petition at pp. 13-15. For an example of

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[1] We shall discuss below the question concerning other accidents in the area, since Respondent's Brief has seriously misstated the facts in connection with this issue. See pp. 5-9, infra.

a Court of Appeal decision in conflict with the holdings of the cases cited by respondent, at least as respondent interprets said cases, 2/ see Sleeman v. Chesapeake & Ohio R. Co., 414 F.2d 305 (6th Cir. 1969). Therein, plaintiff was injured by a negligent motorist while walking in defendant's parking lot. The Court of Appeals held that, in effect, defendant had a duty to protect its employees from the hazards of walking in a parking lot.

WITH RESPECT TO THE FACTS:

We will not burden this Court with a detailed rebuttal of respondent's statements with respect to the facts. Hence, our omission to discuss any particular factual matter set forth in Respondent's Brief does not amount to a concession of the correctness of such matter, to the extent that it is in conflict with the facts as stated in our Petition. We will

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2/ We do not agree that respondent's authorities support its views. Inman v. Baltimore and Ohio R. Co., 361 U.S. 138, 80 S.Ct. 242, discussed at length by respondent (at pp. 11-15 of Respondent's Reply Brief) has already been discussed by us (at pp. 15-16 of our Petition). The other cases on which respondent relies (pp. 15-18 of Respondent's Reply Brief) are also distinguishable. See pp. 10-11, infra.

only refer in this Brief to certain matters we have noted which appear to be seriously misleading.

One such matter is respondent's statement that Mr. Smith could have used the flares as a warning device (Respondent's Brief at p. 20). This testimony is directly contradicted by the testimony favorable to petitioner which we have set forth in our Petition (at p. 11). The resolution of this controverted testimony was, of course, for the jury.

Respondent's contentions with regard to the "jaywalking" (Respondent's Brief at pp. 22-23) are also incorrect. Even though the activity required of Mr. Smith might have been legal, it still constituted jaywalking. See Jones v. Fat, 86 Cal. App. 2d 823, 826; 2 Magana, "Motor Vehicle Accidents," §217, p. 1319; Webster's Third New International Dictionary, Unabridged (1965), p. 1212. If, as respondent contends, to term the activity "jaywalking" is "inflammatory" (Respondent's Brief at p. 22), we respectfully submit that that is only because of the dangerous nature of the activity, and such danger establishes that jury questions were present herein.

The last matter respecting the facts to which we will address ourselves is respondent's attempt to disregard and ignore the evidence of 34 other accidents in the area (Respondent's Brief at pp. 23-25). Respondent asks this Court to infer that most of these

accidents merely involved "the striking of parked cars" (Id. at p. 25). Respondent further asserts that the accidents occurred "all over the Oakland Terminal" and date back as far as 1928. Respondent's Brief at p. 25, text and footnote 7. These assertions are gravely misleading and incorrect.

The facts with respect to the other accidents are as follows:

This matter was first brought up on direct examination of Mr. O'Donnell, Assistant Terminal Superintendent of respondent, and a company official (Rep. Tr. 122:22-25; 124:21-22).

Petitioner's counsel asked Mr. O'Donnell how many accidents occurred in the 10-year period prior to the subject accident, at the crossing entering into the American Can Company property (Rep. Tr. 138:7-10). Objection as to "total lack of foundation as to what type of accident" (Rep. Tr. 138:11-13) was sustained (Rep. Tr. 138:14). Mr. O'Donnell was then asked how many vehicles struck equipment that was being shoved across that crossing at night with no lights (Rep. Tr. 138:15-18). Objection as to insufficient foundation was sustained (Rep. Tr. 138:19-22).

As petitioner's counsel started another question, the Court interrupted and advised petitioner's counsel that he would be limited to automobile-pedestrian collisions, if there is some similarity, but not automobile-train

collisions (Rep. Tr. 138:23-139:5). It was then brought out that automobile-train collisions must be reported to the Public Utilities Commission, but automobile-pedestrian collisions are not required to be so reported (Rep. Tr. 139:7-15). Inquiry as to whether records of automobile-pedestrian collisions would be readily available was objected to, and the objection was sustained (Rep. Tr. 139:16-20).

Counsel was thus limited to the witness' personal knowledge, and while the witness testified that he did not "recall" any accidents involving vehicles striking switching crews at night (Rep. Tr. 139:21-140:1), it is manifest that, in an organization the size of respondent, such accidents could have occurred without that particular witness having knowledge thereof (see Rep. Tr. 140:2-9). Respondent, the party with the information available to it, never came forward at the trial with any evidence to establish lack of similar accidents (see Taylor v. Canadian National Railway Co., 301 F. 2d 1, 2d Cir. 1962, cert. den. 370 U. S. 938) -- which evidence might have been admissible. See Whitley v. Texas and Pacific Railway Co., 328 F. 2d 308 (5th Cir. 1964). This silence was but a continuation of respondent's pre-trial tactics in which respondent demonstrated a determined and vigorous resistance to providing any information on this subject to petitioner by way of discovery.

The pre-trial proceedings with respect to the interrogatories, answers and motions

regarding this subject are contained at Cl. Tr. 24, 34-53, 57, 76, 77, 80-82, 84-87, 98. They establish respondent's reluctance and refusal to disclose information on said subject.

Respondent thus completely frustrated the attempts of petitioner to procure information from respondent, both before trial and during trial. Petitioner thereupon offered to prove at the trial, through an officer of the Public Utilities Commission, that, between January 1, 1958 and October 31, 1968, there were 13 accidents, involving vehicles and respondent's trains, at Crossing No. D-10-14-C, a crossing in the immediate vicinity of the area where the accident occurred (Rep. Tr. 171:8-28). Petitioner further offered to prove that 11 other such accidents occurred at the same crossing prior to January 1, 1958, seven of which occurred subsequent to 1952 (Rep. Tr. 172:5-8). Petitioner further offered to prove that, at crossing No. D-10.37-C, another crossing in the immediate vicinity of the area where the accident occurred, there were 11 such accidents, seven of which occurred since 1957 (Rep. Tr. 172:1-2, 9-13). The offer of proof then referred to three accidents that occurred at other crossings, the locations of which are unclear from the record (Rep. Tr. 172:13-17).

Thus, the offer of proof referred to at least 35 accidents that occurred in the immediate vicinity of the subject accident.

20 of which occurred since 1957.[3] Yet respondent has represented to this Court that the 34 accidents occurred "all over the Oakland Terminal" (Respondent's Brief at p. 23, footnote 7), that they date "as far back as 1928" (Respondent's Brief at p. 23)[4] and that "most of those accidents probably involved the striking of parked cars" (Respondent's Brief at p. 25).

The basic ground of the trial court's refusal to permit the proferred evidence was that the evidence dealt with automobile-train collisions (the only type of collisions as to which petitioner was able to get any information, as above noted), rather than automobile-pedestrian collisions (Rep. Tr. 138:23-139:5). However, it appears clear that if automobiles were colliding with large trains in the area, it is ample proof of notice that grave danger to smaller, less visible humans existed. We respectfully submit that, if the issue of the existence of other accidents is crucial herein, the trial court's ruling was prejudicial to

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[3] The reason our Petition referred to 34 accidents (Petition, p. 9 at footnote 3), is that several of the accidents occurred subsequent to the accident in suit.

[4] Only one of the accidents referred to occurred in 1928. All of the others occurred subequent to January 1, 1945 (Rep. Tr. 171-172).

petitioner.[5] The requirement of similarity of conditions is much relaxed when evidence of other accidents is offered to show notice of the dangerous condition. See, e.g., Hilts v. County of Solano, 265 Cal. App. 2d 161, 169. The offer of proof herein specifically was based on the ground that the proferred evidence was relevant "because it is notice of the dangerous nature of these crossings, including the crossing that went into the American Can Company . . . . ." Rep. Tr. 172:20-22.

This issue was raised and fully briefed in the California Court of Appeal. That Court accepted the proferred evidence as true, since the opinion recognizes that there were "frequent accidents in the area" (Appendix B at p. B-5). Respondent's contention to the contrary (Respondent's Brief, continuation of footnote 7 at p. 24) is thus without merit.

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[5] In view of the testimony of employee complaints, however, we do not believe there can be any question but that respondent received notice of the dangerous condition.

WITH RESPECT TO THE LAW:

As noted (footnote 2, supra), we do not believe that respondent's authorities are applicable to the case at bar. Other than the Inman case, supra, already discussed, respondent relies primarily on dictum in Simpson v. Texas & N.O. R. Co., 297 F. 2d 660 (5th Cir. 1962). Respondent seeks to deduce from that dictum a rule that, as a matter of law, a railroad has no duty to take feasible precautions to avoid exposing its employees to the hazards of jaywalking back and forth across a public street. If this is the proposition of the Simpson case, we respectfully submit that it is wrong, and is in conflict with the principles laid down by this Court and the Courts of Appeal, in the decisions cited by us, and many others. Indeed, forcing a plaintiff into danger from traffic may constitute negligence, even under the common law.

See, e.g.:

O'Neill v. City of Port Jervis, 171 N.E. 694 (N.Y. Ct. App. 1930);

Fennessy v. Pac. Gas & Elec. Co., 20 Cal. 2d 141 (1942);

Shafir v. Seben, 233 S.W. 419 (Sup. Ct. Mo. 1921);

Johnson v. City of Rockford, 182 N. E. 2d 240 (Ill. App. 1962).

This is therefore a case that requires a jury determination.

Finally, respondent relies on Mortensen v. Southern Pac. Co., 245 Cal. App. 2d 241, on the theory, apparently, that this same Court of Appeal decided that case correctly, and therefore must have decided the instant case correctly (Respondent's Brief at p. 26). We respectfully submit that the Mortensen case supports our position, and is yet another case demonstrating the error at bar. There, as here, the respondent Southern Pacific Co. contended that "the sole proximate cause of death was th criminal negligence of the drunken driver[6] . . . " 245 Cal. App. 2d at p. 245. The Court of Appeal held that "the nature of the other driver's act negates neither negligence nor proximate cause. . . . " and rejected the proposition that "the peculiar causation of the particular collision . . . " governs the issues of duty and foreseeability. 245 Cal. App. 2d at p. 245. Rather, it was "the general likelihood of

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6/ In any event, and respondent's inferences to the contrary notwithstanding (Respondent's Brief at pp. 6-7), the evidence did not establish that Mrs. Coker was drunk. See our Petition at p. 10.

automobile collisions upon the highway . . . which governed those issues. Ibid.

The same principles apply herein. It is not "the peculiar causation" of the particular accident at bar which governs the issues here, but rather "the general likelihood" that careless automobile drivers create hazards for these employees of respondent who are required by respondent to jaywalk continuously across the public streets.

CONCLUSION

The subject Petition should be granted.

Respectfully submitted,

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and

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